
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

PEVELY DAIRY COMPANY, a Corporation,					
	v.		Appellant,	}	No. 9,744.
BORDEN PRINTING COMPANY, a Corporation,			Appellee.		

REPLY BRIEF FOR APPELLANT.

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Statement.

Running through the entire argument of the defendant, and the essential part of that argument, is the premise that the Wasser patents are directed to no more than means of fastening the ends of a strip of paper together.

The Wasser patents are not merely to means for fastening paper together. They represent peculiarly apt illustrations of several elements that co-operate together to produce unitary results. Both of these patents have shapings of the edges and individual sizes of arcuate strips of paper, coupled with and by means of which certain forms of connections for the ends are desirable and practical. Without the peculiarly shaped arcuate strips, the connections of the ends are meaningless.

Wasser does not contend that it is invention to glue two ends of a piece of paper together, nor does Wasser contend that it would be invention to attach two ends of a piece of paper together by a tongue and slot connection. Wasser *does* contend that when the arcuate strip is so shaped relative to the neck of a milk bottle with the limitations of those shapings defined by the claims, then the attaching means have unmistakable significance in the combinations.

In 1,829,915 the pivotal connection permits a collar so *shaped* and *sized*, that it otherwise could not fit over the flange and adjust itself to the neck of the bottle, to do just that. The Wasser patent 1,999,011 could not readily pass over the flange of a bottle and rest on the neck thereof without its peculiar size and shape, but that shape permits the device to be attached by immovable and hence secure connection.

This fallacy of defendant's major premise is an important point, since it has pervaded the defendant's argument and testimony, both here and in the District Court. It was presented with such fervor before the District Court that the District Court apparently accepted it, since otherwise the decision could not possibly have been what it was. And defendant persists in avoiding the attack made on this error by plaintiff in its main brief on appeal.

The Wasser Patents Are Distinct.

Defendant purports to establish its fallacious point by quoting from the opening statement of the plaintiff's counsel, but, in so doing, omits from its quotations part of the statement. We do not feel that this is fair tactics. Certainly it is not valid argument. Contrary to the implication of the defendant by its incomplete quotation, Mr. Kingsland actually said as to patent 1,829,915 (R. 90):

“That patent relates to a display device *having a*

particular form adapted, as I say, to being put over the standard milk bottle. That one is referred to as the pivoted connection form.” (Emphasis added.)

Thus plaintiff has from the outset urged that these collars have a peculiar size and shape and are not merely patents on means for connecting two ends of a strip of paper.

To show that difference in size and shape constitutes an essential distinction between the two Wasser patents on appeal, consider that 1,829,915 has a size and shape with which the pivotal connection is of great importance, whereas the different size and shape of 1,999,011 are such as to dispense with the necessity of the pivotal connection. In other words, what 1,829,915 does by the connection in its combination, 1,999,011 does by its size and shape in its combination.

Of course, we are not interested in patent 1,923,856, which, as distinguished from the other two patents, was mainly to a peculiar form of slot connection. This incidentally was not disclosed in the art, but no appeal has been taken on this patent.

To urge that one patent differs from the other on the basis that they have different connecting means is to ignore that these connecting means can differ only because 1,999,011 provides a distinct shape by means of which it may dispense with the pivotal connection.

There is no double patenting and defendant does not point out wherein double patenting exists. There must be claims in both patents that dominate both species in order to have double patenting. This was pointed out in our main brief, but defendant does not meet our argument.

Miller v. Eagle Mfg. Co., 151 U. S. 186, is a wholly different situation. There a certain construction performed two different functions. Contrasted with the present pat-

ents, which differ in sizes and shapes and connecting means, both patents in *Miller v. Eagle* disclosed only this single mechanical construction. One patent sought to claim one of its functions; the other patent sought to claim both of its functions.

Defendant's final conclusion, based as it is upon a complete misconception of the law of double patenting, despite our explanation of that law in our main brief, is that Wasser patent 1,999,011 is invalid over patent 1,829,915. Aside from the basic error in law, this, of course, runs into the difficulty that the 1,999,011 patent is a continuation of an application filed prior to the filing of 1,829,915 application.

The Alleged Anticipation of the Wasser Patents.

Defendant makes the peculiar statement that because plaintiff felt that the alleged proof by defendant of prior art was too inadequate to justify rebuttal, that plaintiff does not challenge that proof.

The defendant has the burden of proving invalidity, and it is a heavy burden. Defendant simply does not sustain that burden. Testimony is not necessary to refute a position assumed by an unqualified witness that wholly non-analogous patents, coupled with untrue models, invalidate these Wasser patents.

Defendant does not agree with the lower court, which, as we pointed out, rests its decision upon Guardino, Taylor, Goes, Gridley and Spellman, for defendant now relies upon the Swiss patent to Huber as essential to its allegations of validity. This is a sharp blow to any argument to uphold the decision below. In fact, defendant goes so far as to urge that Huber alone actually shows everything that is supposedly new in the Wasser patents.

The Patent Office allowed both Wasser patents over the

Huber patent. The reason for this would be evident to defendant if it were not blinded by its belief that these patents are for means of attaching the ends of a piece of paper together, rather than for combinations including the shapes of the paper.

Defendant urges that the District Court actually considered Huber as basic to its holding of invalidity. In view of the fact that the District Court did not mention the Huber patent and did mention the other five, we feel that defendant's conclusion is completely unjustified.

The Alleged Models.

Defendant then, in furtherance of its complete misconception of the patents in suit as being merely for attaching means, states that certain patents *and* certain models of the patents anticipate the Wasser inventions.

But the models that defendant has used are not models of the patents which they purport to represent, because they have not only been changed in size, which defendant concedes, but there have also been changes in shapes. (See Main Brief, p. 57.) The several patents from which the models were alleged to have been made do not show devices capable of use upon milk bottles. Furthermore, even if they had been changed in *size* to fit upon milk bottles, they would not have had the *shapes* to pass over the flange and rest snugly upon the tapered neck. It is in this fact that the distinctions of the Wasser patents are brought into the open. The Wasser patents are shaped to fit the tapered neck and by their peculiar shapes they pass over the flange, despite the fact that it is larger than the minimum top of the collars.

What Roemer did to the prior patents in making the models was to change their *sizes and shapes* in the *light of the Wasser disclosures* so that they would fit over the

bottle necks. This is, of course, a recognition that the Wasser patents are different in substance.

Another objection to the models, aside from their rather subtle but quite improper insertion into this record as being true models, when actually they were not, is that the models, of course, cannot anticipate the Wasser patents, although defendant does not rely upon the prior patents themselves but upon the patents *and* the models. The models were not made until this suit was tried, ten years after the Wasser patents issued.

It was thought that defendant would not use these models on appeal, owing to their being such undeniable misrepresentation. As defendant still finds them necessary to its defense, plaintiff is compelled to make the open statement that it considers these models deceiving to the lower court, and attempted deceit of this Court, a complete discredit to Roemer, and one of the most astonishing examples of improper distortion of equity lately witnessed. The use of the models is indefensible. The manner of using them with the implication that they are true models is, we earnestly feel, reprehensible.

A like matter occurred in *Otis Elevator Co. v. 570 Building Corporation et al.*, 35 U. S. P. Q. 420, 433 (affirmed 98 F. [2d] 699), wherein the court said about the expert used there:

“* * * Mr. Kramer’s testimony throughout was quite unsatisfactory. He was perhaps too partisan, being more of an advocate* than a witness * * *.”

And at page 437 that court found as a fact:

“The diagram (Defendants’ Exhibit T-1) and the other diagrams produced by Mr. Kramer were made in the light of his 1937 knowledge after almost a year’s study of the patents in suit. In general, *they*

*Note that Roemer was an employee of defendant’s lawyers.

included changes which were not within the skill of one in the art as of the date of the inventions of the patents in suit and which were *flagrant departures from the disclosures* of the *prior art* items. The diagrams were drawn after and for the purpose of supporting his adverse opinions, as an interested party, against the patents and were not fairly drawn. *Mr. Kramer's difficulties prove invention* in the patent in suit rather than otherwise." (Emphasis added.)

Such admittedly untrue testimony as Roemer gave certainly did not deserve any rebuttal.

The Taylor patent and its alleged but untrue model apparently are used for no purpose by defendant, since it merely refers them to the Bell-Brook collar, which is not in suit.

All of these samples have been changed. Guardino started out being a charlotte russe container which, of course, could not fit over the milk bottle. Taylor is a sleeve protector. Goes was a ham holder, and Gridley a fruit basket.

Huber is a file wrapper reference formed of a perfectly straight strip of paper which could not be a success as a bottle collar. It would not stay on a bottle, it would not give adequate advertising space, and in these defects it wholly lacked any need to deal with the problems of fitting on the bottle neck, passing over the flange, and giving adequate advertising space. But plaintiff has no objection to defendant's using it. The Patent Office recognized these distinctions and their importance. Huber does not have a lower diameter equal to the diameter of the bottom of the bottle. It does not have an upper diameter anywhere nearly equal to the diameter of the flange and it is not formed of an arcuate strip of material.

Incidentally, the Huber patent was urged before the

court in Cleveland and was rejected. It was injected before the lower court here and disregarded. It was injected before the Patent Office and discarded.

In connection with the Spellman patent, which is for a lamp shade, and is another patent of record before the Patent Office in both files and also before the court in Cleveland and rejected by both, the defendant here apparently confused the lower court by the introduction of an alleged model of this patent. Defendant was called upon to produce *all* bottle collars that it ever made, by plaintiff's motion filed in November, 1938, a year before the trial (R. 13). For some reason, which we have designated as a purpose to try this case by the policy of surprise and error, defendant held out several collars, and then at the opening of the case, excluding plaintiff from any preparation for them, it invoked two additional collars which it sought the right to litigate. These tactics were considered unreasonable by the lower court and these collars were excluded.

Then defendant sought to show that one of these collars was a representation of the Spellman patent. The collar is not a representation of the Spellman patent. If it is, it shows that the Spellman patent cannot anticipate these claims, because this *model required the use of slits in its upper edge* to permit it to pass onto the bottle. There is no such thing in Spellman and we see not the slightest excuse for the introduction of this model, nor the slightest truth in the testimony that Roemer gave concerning it. It was, in our opinion, one of the most unfair demonstrations that it has ever been our experience to witness in a court of equity.

The Brown patent relied upon so strongly by Roemer is the patent for a metal collar discussed in our main brief.

Brown has no attaching means at all. If defendant wants to make these metal collars, plaintiff is entirely willing.

Defendant evidently does not feel that this reference can anticipate the claims that have always been used as typical, since it ignores our analysis of claim 4 and changes to claim 11 of 1,829,915.

This is a concise indication that claim 4 is not met.

Even as to claim 11, let it be observed at the outset that claim 11 recites a display device or bottle collar; Goes is a ham holder. It seems doubtful that Goes has the upper and lower edges of the overlapping portions of the ends approximately even with each other as required by claim 11. They are not so shown in Fig. 1 of the Goes patent, which defendant, for all its exuberance of pictures, has omitted from its brief. Goes sought a rigid connection and described its ends as being "firmly locked in position" (R. 374, line 104). And certainly Goes had no shaping to permit his ham holder to be placed upon a support which projected through it, since then it would lose its value as a ham holder.

Defendant does not even attempt to read claim 11 (much less claim 4) on Guardino's charlotte russe container, Taylor's paper box, Gridley's fruit basket, Brown's metal clip with unattached ends or Huber's straight strip of paper, but merely indicates that these references are as close. The point is that the patents cannot be invalidated without references a great deal closer than any or all of these.

Defendant bases its use of these various ham holders and fruit baskets on *Willamette Iron & Steel Works v. Columbia Engineering Works*, 252 F. 594, where it was held that a clothes line pulley invalidated a larger pulley.

The distinction seems obvious to us, for making Guar-

dino from a little charlotte russe box into a huge one would still not make it into a bottle collar. Likewise, huge fruit baskets, or huge paper boxes, or huge ham holders, or huge lamp shades would still not be bottle collars. What we are interested in here is not milk bottle sizes, but bottle collars having defined shape and configurations, as well as connections.

Certainly, an old device to a new use does not constitute invention. Defendant did not need to burden its brief with a lot of decisions to that end, but we defy defendant to use the Gridley fruit basket as a bottle collar, or the Guardino charlotte russe box as a bottle collar, or Spellman's lamp shade, or any of these references from wholly different arts, as bottle collars.

Defendant contends that Brown, the British patent and Huber, the Swiss patent, belong with Gridley, Guardino, Goes, and Taylor to invalidate the Wasser patent 1,999,011. Here, again, defendant departs from what the lower court used, since defendant does not seriously contend that the five patents relied upon by the lower court can invalidate the patent without the help of the two foreign patents which were of record before the Patent Office and over which the patents were allowed. *This position virtually destroys any belief that the decision of the lower court has any weight.*

We refer again to defendant's fundamental misconception of this whole patent situation. None of these references remotely suggests or discloses a bottle collar that is shaped to fit on the tapered neck of a bottle, and which has an upper end sloping so as both to fit over the flange and, nevertheless, to permit use of an immovable connection.

Defendant's attack of validity on the two patents, based as it is upon the combination of wholly remote references

and wholly inaccurate models, seems to us to be singularly ineffective.

The Matter of Infringement.

Defendant urges that there is no evidence of infringement here. This is an unusual statement, because the patents in suit and the accused devices are in suit, and admitted to have been made by defendant. Certainly this Court can understand both how these patents work and how the accused devices work. That is all that is required or even proper. *Wire Tie Machine Co. v. Pacific Box Co.*, 102 F. (2d) 543, 557 (C. C. A. 9). Beyond that the issue of infringement resorts wholly to a legal interpretation of the patent claims.

In *Corning v. Burden*, 15 How. 252, 270, 14 L. ed. 683, the Supreme Court clearly set forth the rule as follows:

“The refusal of the court to hear the opinion of experts, as to the construction of the patent, was proper. Experts may be examined as to the meaning of terms of art on the principle of ‘*cuique in sua arte credendum*,’ but not as to the construction of written instruments.”

The Eighth Circuit elaborated the rule in *Wisconsin Alumni Research Foundation v. George A. Breon & Co.*, 85 F. (2d) 166, 171, as follows:

“* * * The testimony of experts must always be weighed and considered with discrimination. *Where the meaning of certain terms or the ascertainment of the ingredients of certain products presents nothing technical*, expert testimony is *inadmissible* in explanation. *United States v. Ten Cases*, more or less, *Bred Spred* (C. C. A. 8) 49 F. (2d) 87, 91; *Claude Neon Electrical Products v. Brilliant Tube Sign Co.* (D. C. W. D. Wash.), 40 F. (2d) 708, 717, reversed on other grounds (C. C. A.), 48 F. (2d) 176. Even where

expert testimony is competent, the tribunal before which it is given is not bound to follow it, *Tracy v. Commissioner of Internal Revenue* (C. C. A. 6) 53 F. (2d) 575, 577; and *it has no probative effect when contrary to the dictates of common sense or when the expert in giving it is clearly guilty of misinterpretation*, *U. S. v. Spaulding*, 293 U. S. 498, 507, 55 S. Ct. 273, 79 L. ed. 617; *United States v. Hill* (C. C. A. 8) 62 F. (2d) 1022, 1026." (Emphasis added.)

Frankly, we do not see any excuse for having an expert witness in this case. All that experts are ever permitted to do is to explain intricate mechanical constructions in a patent, or in the prior art, or in the accused devices. These matters are all perfectly clear here. Defendant argues on the one hand that the patents are too simple, and on the other hand that the patents require an expert witness to explain them. The weakness of both arguments reveals itself in this inconsistency.

Now, the patented devices are simple. The plaintiff is quite proud of the fact. Only simple devices could ever have obtained the commercial success that these have. The beauty of these patents is that their inventions accomplish in such a simple way the problems involved.*

Defendant develops a case of rather excessive virtuous indignation about exhibit 28, even to the point of citing long quotations from cases, for some reason or other calling this exhibit 28 infamous.

It would have been a lot better if defendant had concentrated this part of its brief to pointing out what is wrong in exhibit 28. This it does not do.

Frankly, plaintiff feels neither infamous nor lacking in

*Dumas remarked that the course of human invention is toward simplicity, and that simplicity is perfection.

virtue in having referred to exhibit 28. After all, that was the designation given to it (R. 156). That exhibit was offered for one purpose and has never been offered for any other. That purpose was to give a graphic illustration of plaintiff's position about the infringement. It makes no difference whether it be called attorney's argument, which we admit it is, or anything else. If it is helpful to the Court, for that purpose its presence is certainly justified.

Infringement of 1,829,915.

As to the infringement, defendant argues that plaintiff cannot read out of the claims in suit elements that are there, the argument being embellished by the citation of a number of cases.

This exposition of the law would be pertinent only if plaintiff were attempting to read any elements out of these claims. Since plaintiff has consistently urged that every element in the claims is found in the accused devices, defendant's argument lacks all point.

Plaintiff does not contend that the pivotal means can be omitted from claim 4 in 1,829,915. In fact, we do not know what defendant is talking about, because it was our understanding that the whole accusation of infringement was based upon the fact that exhibits 3, 4 and 5 do have this enlargement of the upper diameter. Plaintiff just wants defendant to stop making collars like the Wasser collars. If others can be made, let defendant make them, and leave ours alone.

We reiterate the position set forth in our main brief that exhibits 3, 4 and 5 have the pivotal connection, which of necessity involves enlargement of the upper diameter.

Infringement of 1,999,011.

As to infringement of 1,999,011, defendant's argument of noninfringement is used so enthusiastically as to reduce it to an absurdity.

On Page 47 of its brief defendant argues that the exhibits are not arcuate pieces of pliable material. This argument is sheer nonsense. The same may be said for the argument that their lower diameter is not approximately equal to the body portion of the bottle. It certainly is. Defendant concedes that the upper diameter is approximately equal to the top flange of the bottle, but it urges that the lower edge of the devices is not concentric to the longitudinal axis of the bottle.

In the first place, the lower edge of the device is substantially concentric with the longitudinal axis of the bottle, as the slightest inspection shows. In the second place, the claim merely says that the upper edge has a certain position *when the lower edge is given a position concentric to the longitudinal axis of the bottle*. In other words, the device does not need to stay in this position.

Defendant, in referring to the file history, openly states that the arguments before the Patent Office limited claim 3 of 1,999,011 to a permanent and immovable connection.

This is not the truth, and in its untruth is very unfair to plaintiff.

The facts are that not one of the claims now in this patent was ever limited in any way by the Patent Office. The claims about which the argument defendant quoted was presented did not claim the shaping of the upper edge permitting the immovable connection, which combination the Patent Office at once and consistently recognized as patentable. The "claim 3" referred to on page 49 of de-

fendant's brief was *not* claim 3 in suit, but was original claim 3 of the application* not including the sloping top. And the word "permanent" did appear in one of the original claims, but *never in either of the three claims allowed.*

Claim 3 of 1,999,011 has a perfectly clear health certificate in its file history. Defendant's argument is quite unjustified, and in all fairness to the true facts and to plaintiff, this main basis of defendant's attack on 1,999,011 should be disregarded and stricken.

Not only does defendant's argument fall, but its untruth emphasizes the real fact of the genuine *merit* in the combination of the irregular upper edge with the immovable connection rendered practicable by it.

This combination is neither shown nor remotely suggested by any of the prior art patents. This is the combination defendant has bodily appropriated, in all of its elements.

Commercial Success.

Defendant attacks the outstanding commercial success of these bottle collars by some rather peculiar arguments. In the first place, it assumes that defendant has only a certain percentage of the total potential market. Defendant cannot talk itself out of the impact of 500,000,000 bottle collars in public use, even by any argument based upon gratuitous but convenient assumptions.

Sales to 163 dairies in California is a big business, regardless of what defendant says. Defendant's argument fails to show whether the remaining California dairies were using *any kind* of advertisements attached to the bottles.

*Claim 3 in suit was claim 6 of the application.

Defendant strangely urges that 800,000 bottle hangers or flat hangers had been used by Golden State in the three years (1927-30*) *prior* to their use on the bottle collar. What this has to do with the commercial success which superseded the use of flat hangers, by Golden State, we have no idea.

Certainly defendant's statement that Golden State does not recognize the bottle collar is both gratuitous and untrue. Golden State realized the virtues of bottle collars over their only commercial predecessors, the flat hanger, and used them extensively in quantities twice as great as their prior use of flat hangers (R. 104, 108).

Defendant contends that because Neher-Whitehead & Company has not put out collars under Patent 1,999,011 that the patent is a paper patent. But the Wolf Envelope Company in Cleveland put out collars that were held to be an infringement of that patent by the Cleveland suit, and Tucker in New York took a consent decree for having made collars under that patent, whatever Neher-Whitehead & Company did.

So defendant concludes with the astonishing statement that there has been no commercial success *by the plaintiff* of the bottle collars of the patents in suit. We never knew that there was any rule that commercial success had to be based upon use by the plaintiff alone and not by plaintiff's licensees and others. And defendant's allegations that the sale of 500,000,000 for over \$1,000,000, is a small public use seems to us to be a type of argument that a defendant would offer when it was worried by the facts.

Lack of Appeal on Patent 1,923,856.

Defendant's argument that the failure to appeal on patent 1,923,856 has something to do with the validity of patents 1,829,915 and 1,999,011, is wholly obscure.

*Bottle collars were not put on the market until May, 1929.

The Cleveland Suit.

Defendant lightly passes over the Cleveland suit. Actually the art in that case was in the main the same as that here. It was every bit as good, but not so multifarious. The court gave generous interpretations to the Wasser patents. As to any collars held not to infringe in that suit, defendant was advised concerning them, not at the trial *as defendant states* but on April 27, 1938, some *six months prior to the trial*, by defendant's bill of particulars, which gave defendant the entire decree and findings and exhibits of the Cleveland suit (R. 24).

Defendant's gentle touch (except for its unjustified implication) used in connection with this Cleveland suit is the strongest kind of argument of the force of that suit for the plaintiff.

Public Acquiescence.

Consent decrees are inevitably indications that the public has accepted the validity of the Wasser patents. Plaintiff has no way of compelling anyone to defend a suit and no way of preventing a defendant from taking a consent decree.

Again, the Golden State Company suit was dismissed because Golden State agreed to buy collars from plaintiff. If this is a nebulous reason, then all contracts are nebulous. Certainly Golden State, if and when it violated this agreement, insisted that the defendant here gave it an indemnification against these patents, which confirms the recognition by that Company of their significance (R. 195).

As to "tackling" a large company, plaintiff has sued where the infringements were found. The Wolf Envelope Company is a large company, and the Borden Printing Company, this defendant, has made no claim of being

small and insignificant. Whatever may be said for Manhard alone, there is no suggestion that Rusling Wood and Tucker are small.

This evidence of public acquiescence by these consent decrees remains persuasive in favor of the validity of the patents. Whether or not it is controlling, it is inevitably strong evidence.

Joinder of Parties Plaintiff.

Defendant argues that an indispensable party has not been joined as party plaintiff. This whole argument is predicated on the assumption that the license is exclusive, but in accordance with the Supreme Court in *Waterman v. Mackenzie*, 138 U. S. 252, and other cases cited in our main brief, the license is not exclusive, since it granted only the right to make and sell without a right to use. No manner of argument by the defendant here can make it exclusive, the controlling decisions being to the contrary.

We are simply not interested in all of these cases cited by the defendant relative to exclusive licenses.*

Defendant has not pointed out a single matter between these parties that might be adjudicated differently if Neher-Whitehead & Co. were a party.

It is worthy of comment that defendant alleges on the

*Defendant's citations are not in point.

Chicago, M. St. P. R. R. Co. v. Adams, 72 F. (2d) 816, related to parties defendant, and found that a decree without county treasurers as defendants would be improper.

Adams v. Burke, 17 Wall. 453, involved a sale of patented articles, and not a license to make and to sell them.

Waterman v. Mackenzie, 138 U. S. 252, is discussed in our main brief. The portion quoted by defendant is wholly consistent with our discussion.

Green v. LeClair, 24 F. (2d) 74, involved a license to make, use and sell.

Dooley Improvements, Inc., v. Motor Improvements, Inc., 1 F. Supp. 641 (affirmed 66 F. [2d] 553), a special suit under R. S. 4918, involved a license to make, use and sell.

one hand that the license situation was uncovered only on the first day of the trial, and on the other hand that Neher-Whitehead & Co., through Mr. Neher, is said to be the company to have caused the litigation by virtue of being a licensee. Defendant's left hand alleges knowledge of which its right hand professes ignorance.

Of course, defendant knew about the license months before the trial was held, and it could have been produced in any motion for interrogatories that defendant cared to present. But the license is immaterial at all times.

Conclusion.

In final analysis, defendant has presented a brief of clever argument. It is clever because it dodges the issues rather than meeting them, which is by far the best tactic to be employed by the defendant in the face of this record. *But defendant's brief is run through with a free disregard of the facts, which, whatever else may be said, inevitably destroys all of the arguments.*

The ultimate argument is that defendant never answers the question of why it insists upon making bottle collars just like the plaintiff's bottle collars. It could have made them like the Swiss patent that it so strongly urges, which would have been wholly different and without plaintiff's patents. It could have made them out of metal, like Brown's British patent, and have been wholly free of the charge of infringement. It could have made ham holders or fruit baskets or flower pot devices if it chose. In the phraseology of the lower court, and upon which that court wrongly predicated its decision (R. 170), defendant is fully entitled to make either "horse collars or lamp shades."

Defendant did not choose to make ham holders, or fruit baskets, or metal clip collars, or straight strip collars. In

infringing, it paid a magnificent tribute to the virtue of the Wasser inventions in insisting upon using them and no others, but that compliment, involving usurpation as it does, is wholly inadequate compensation to the plaintiff.

Respectfully submitted,

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